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BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other Customer Information	)	

COMMENTS OF AIRTOUCH COMMUNICATIONS

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May 8, 1998

Table of Contents

Summary

AirTouch Communications, Inc. supports the petition by the Cellular Telecommunications Industry Association seeking temporary deferral of the effective date of the application of Rules 64.2005(b)(1) and (b)(3) to commercial mobile radio services. Application of these rules to CMRS providers will impede competition in the CMRS market and interfere with the ability of customers to obtain new wireless services and features. Further, the Commission has ignored technical and service distinctions unique to the competitive mobile services market. Moreover, AirTouch submits that Section 222 of the Communications Act does not require this negative result.

Postponing the effective date of these rules will serve the public interest by maintaining the *status quo ante* while the Commission examines the unintended, undesirable, and heretofore unconsidered, consequences of these new customer proprietary network information rules as applied to CMRS providers. Further, delay in implementation of these rules will result in no harm to any party. Therefore, AirTouch urges the Commission to defer the effective date of Rules 64.2005(b)(1) and (b)(3), to the extent they apply to CMRS providers, pending further consideration of its recent order governing the use of CPNI. AirTouch also asks that the Commission act on this request before May 26, 1998, the date the rules are set to take effect.

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COMMENTS OF AIRTOUCH COMMUNICATIONS

AirTouch Communications, Inc. ("AirTouch") submits these comments in support of the request by the Cellular Telecommunications Industry Association ("CTIA") that the Commission defer temporarily the effective date of new rules 64.2005(b)(1) and (b)(3), insofar as they apply to the provision of commercial mobile radio services ("CMRS").[1] Postponing the effective date of these rules pending reconsideration or consideration of a forbearance petition would serve the public interest.[2] Among other things, a deferral would ensure that long-standing CMRS marketing programs which CMRS customers desire and which the Commission has determined are pro-competitive are not dismantled while the Commission develops a more

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1 *See Public Notice*, "Pleading Cycle Established for Comments on Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Information Request for Deferral and Clarification," DA 98-636 (May 1, 1998).

2 CTIA asks that the effective date of these rules be postponed for 180 days. *See* CTIA, Request for Deferral and Clarification, CC Docket No. 96-115, at 1 (April 24, 1998). While AirTouch is confident the Commission will promptly address the reconsideration/ forbearance petitions, given the complexity of the issues it may be more prudent for the Commission to instead defer the effective date "until [the Commission] rule[s] on the petitions for reconsideration." *Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, 11 FCC Rcd 856, 857 ¶ 2 (1995) ("*PIC Change Deferral Order*").

thorough record to examine the consequences of these new customer proprietary network information ("CPNI") rules as applied to CMRS providers.

I. Statement of Interest and Background

AirTouch is the nation's largest provider of broadband CMRS, and it has participated in this market since the Commission first allocated spectrum for cellular service. A major reason for its success is the commitment AirTouch has given, and continues to give, to customer service — a commitment reflected in *Wireless Week's* recent award to AirTouch of its "1997 Cellular Carrier Excellence Award."

Delivery of superior customer service includes several components. One is the need for carriers to respect the privacy of their customers. AirTouch has always had a strong commitment to ensure that a customer's CPNI is not misused or otherwise disclosed improperly. With competitive alternatives, customers will not remain customers if they perceive their serving carrier does not respect their privacy and the privacy of their personal calling information.[3]

However, an equally important component of superior customer service is a carrier's responsibility to identify and respond to customer expectations. In the CMRS context, and because of the mobility of service, customers require and need their service providers to advise them of service offerings and packages which will make their lives more convenient or enable them to save money. This activity also has potential public safety impacts. AirTouch takes this responsibility seriously; it has been able to meet this customer need because it has been free to use their CPNI to make recommendations for their consideration. By using CPNI, AirTouch has been able to identify the customers that are most likely to be interested in a new

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[3] The Commission is correct in noting that, in competitive markets, "carrier policies concerning the protection of personal information may very well factor into the customer's selection of their carrier." *CPNI Order* at 50 n.233.

feature or package and to forego contacting the customers who are least likely to be interested in the same feature or package.

Initially, AirTouch was unconcerned about the enactment of Section 222 in the Telecommunications Act of 1996, although it had not previously been subject to any formal CPNI requirements. As AirTouch read the statute, the new provision incorporated the practices which AirTouch had already been following voluntarily. Specifically, Section 222 protected consumer privacy interests *without* undermining the customer expectation that their serving carrier would continue to advise them of ways to improve their lives or save them money. The latter is apparent from review of Section 222(c)(1), which provides:

> [A] telecommunications carrier that receives or obtains [CPNI] by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable [CPNI] in its provision of (a) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.[4]

AirTouch knows of no legislative history suggesting that Congress intended to change current CMRS marketing practices. After all, these practices had been remarkably successful both in terms of providing a rich array of new services and features to consumers and in the absence of consumer complaints.

In its *CPNI Order,*[5] the Commission correctly determined that CMRS is fundamentally different from landline services, that CMRS carriers should be treated differently in applying Section 222(c)(1), and that, under Section 222(c)(1)(A), a CMRS may continue to

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4 47 U.S.C. § 222(c)(1).

5 *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Information and Other Customer Information,* CC Docket No. 96-115, *Second Report and Order,* FCC 98-27 (Feb. 28, 1998), *summarized in,* 63 Fed. Reg. 20326 (April 24, 1998)("*CPNI Order*").

use CPNI in the marketing and sale of any CMRS.[6] Because CMRS providers are in the mobility business and because AirTouch provides a wide array of integrated services and products to meet consumers' ever-changing mobility needs, AirTouch believed that Section 222(c)(1)(B) would allow it to continue to use CPNI to market and sell any feature or package "necessary to, or used in, the provision of" CMRS — including CMRS handsets, which are "necessary" to radio services,[7] and voice mail services which many consumers find critical to their mobility needs. All the packages AirTouch has developed have one goal in mind, namely to meet the mobility needs of consumers. Consequently, all components of its packages are "related" and fall within "the existing customer-carrier relationship."

The Commission's brief discussion of Section 222(c)(1)(B) in its *CPNI Order* gave scant attention to CMRS and the unique market the service fills. Instead, as CTIA has demonstrated in its Petition, the Commission interpreted this provision using legal classifications developed for landline carriers (*e.g.*, "basic," "adjunct to basic," CPE, and information services) and extended these classifications to CMRS — even though these classifications have no meaning or application to the competitive mobility market which CMRS providers serve.

The strict application of landline legal classifications to CMRS is not required by Section 222, and will have unintended and undesirable consequences for CMRS carriers and their customers. CMRS has become pervasive in our society in part because CMRS providers

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6 *Id.* at 31 n.149 (For purposes of Section 222(c)(1)(A), "CMRS should be viewed in its entirety."); 31 ¶ 40 (the Commission "reject[s] the notion that CMRS is not a separate offering.").

7 As CTIA discusses, the wireless handset is in fact technologically inseparable from transmission service and fundamentally different from landline service. *See* CTIA Petition at 16. The handset is itself a radio transmitter and must be programmed with data unique to each subscriber prior to service activation. In other words, the handset is more akin to a personal transmitter than landline telephone sets which can be plugged-in and used anywhere there is an appropriate connection.

have enjoyed the flexibility to meet and match customer expectations and treat consumers individually. This flexibility has not adversely affected CMRS customers' privacy rights. Indeed, unlike local exchange service, the CMRS market is robustly competitive and such competition provides strong inherent protections for customer privacy. Put simply, a CMRS customer has a *voluntary* business relationship with a given carrier and can easily choose to give their business to another carrier if a given provider does a poor job of maintaining customer confidentiality. Given the difficulty and expense of attracting and maintaining new customers, CMRS carriers have strong incentives to use CPNI in a responsible manner.

CMRS providers' flexibility in tailoring service packages to meet customers' needs is now at grave risk. Two new CPNI rules in particular will cripple AirTouch's ability to continue to meet customer expectations and requirements. Specifically, under new rule 64.2005(b)(1), AirTouch may use CPNI to sell call forwarding, for example, but not voice mail — even though a customer may find voice mail to be more important to his or her mobility needs. Similarly, under rule 64.2005(b)(3), AirTouch apparently may not use CPNI to offer former customers lower prices or a better package of services than the competition is willing to offer.

The rigid lines the Commission has drawn for CMRS are neither consistent with past practice nor consumer expectations. For example, AirTouch currently offers numerous mobility packages where, for one price, customers receive a bundled package which includes information services, such as voice mail. However, under the new CPNI rules, it would appear that AirTouch can no longer use a customer's CPNI to identify customers who may find such packages to be particularly attractive — whether because they would enjoy more capabilities or a lower price — simply because one or more components of the package are not deemed to be a

"basic" or "adjunct to basic" service. Consumers do not understand these regulatory classifications; they simply want AirTouch to find new and better ways of meeting their mobility needs. No privacy or competitive concerns are implicated by maintenance of the current beneficial practice, and AirTouch submits that Section 222 does not require a contrary result.

AirTouch believes that the *CPNI Order* as applied to CMRS requires a more careful analysis — whether on reconsideration or in a petition for forbearance. But the issue now before the Commission is not whether the *Order* should be reconsidered, but rather whether the effective date of new CPNI rules should be deferred so a more complete record can be developed and so the Commission can accordingly make a more informed decision on the issues raised. AirTouch demonstrates below that a deferral of the effective date of rules 64.2005(b)(1) and (b)(3), as applied to CMRS providers, would be in the public interest; would be fully consistent with past Commission precedent; would maintain the *status quo;* and would prevent substantial dislocation to the vibrant and intensely competitive CMRS market.

II. The Commission Should Exercise Its Broad Discretion by Deferring the Effective Date of New Rules 64.2005(b)(1) and (b)(3) as Applied to CMRS Providers

Section 1.103 of the Commission's rules authorizes the Commission to "designate an effective date that is . . . later in time than the date of public notice of such action."[8] The Commission adopted this rule to make clear that it has "broad discretion to designate the effective date of its actions."[9] The Commission has exercised discretion under Section 1.103(a)

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[8] 47 C.F.R. § 1.103(a). In this regard, the Administrative Procedures Act gives the Commission considerable flexibility to establish the effective date of its own rules. *See* 5 U.S.C. § 554(d).

[9] *Addition of New Section 1.103 to the Commission's Rules of Practice and Procedure,* 85 F.C.C.2d 618, 620 ¶ 8 (1981). If the Commission invokes 47 C.F.R. § 1.103, it could avoid having to engage in the four-part stay analysis generally required by the *Virginia Petroleum Jobbers* case. *See, e.g., CMRS Rate Integration Deferral Order,* 12 FCC Rcd

(continued...)

in a wide variety of contexts, including where "application of a rule could raise issues that are best resolved with the benefit of additional information,"[10] where "immediate application of [new] requirements . . . could be disruptive to consumers,"[11] where there is "apparent industry confusion regarding" the scope of the new rules,[12] and where reconsideration petitions should be resolved "before requiring affected parties to take actions to comply with the [new] requirements"[13] Moreover, the Commission has invoked its Section 1.103 authority where its original order did not consider fully the unique situation faced by the competitive CMRS industry.[14] All of these reasons apply here and warrant a deferral of the effective date of new rules 64.2005(b)(1) and (b)(3) as applied to CMRS providers.

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9 (...continued)
at 15749 n.57. This procedure would allow the Commission to focus resources on addressing the merits of the reconsideration/forbearance petitions rather than the procedure by which these merits can be addressed. *Compare* GTE, Petition for Temporary Forbearance or, in the Alternative, Motion for Stay, CC Docket No. 96-115 (April 29, 1996). In any event, AirTouch submits that the requirements for stay or temporary forbearance are also met in the instant case. *Id.*

10 *Policy and Rules Concerning the Interstate, Interexchange Marketplace,* 12 FCC Rcd 15739, 15747 ¶ 15 (1997) ("*CMRS Rate Integration Deferral Order*"). *See also PIC Change Deferral Order,* 11 FCC Rcd at 857 ¶ 2 ("[T]emporarily staying the PIC verification requirements . . . will allow the Commission to develop a complete record upon which we can conduct a meaningful cost-benefit analysis and make a more informed decision.").

11 *CMRS Rate Integration Deferral Order,* 12 FCC Rcd at 15747 ¶ 15. *See also PIC Change Deferral Order,* 11 FCC Rcd at 857 ¶ 2 ("[A] brief stay will be less disruptive to consumers and industry than allowing the requirements to take effect before the issues raised by [petitioners] are fully resolved.").

12 *Amendment of Part 22 Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service,* 8 FCC Rcd 8135 ¶ 1 (1993).

13 *Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers,* 11 FCC Rcd 856, 857 ¶ 2 (1995).

14 *See CMRS Rate Integration Deferral Order,* 12 FCC Rcd 15739 (1997).

A. Application of the new CPNI rules raise issues unique to CMRS which are best resolved with the benefit of additional record information. As discussed above, CMRS providers serve a unique market — mobility — and they have developed service packages and marketing procedures to meet this market demand. One of the most important developments in the CMRS industry has been the widespread use of product/service integration — that is, the bundling of different features in packages which consumers find attractive because they meet their particular mobility needs. These packages often include information services such as voice mail and traffic reports, and virtually always include CMRS handsets, which act as radio transmitters necessary for service.

Customer win-back programs are also important pro-competitive practices in the CMRS industry. Attracting and signing-up new customers requires a substantial capital investment by carriers. Consequently, carriers have strong incentives to win-back former customers and often offer former customers lower rates or additional services as an incentive to return. Such win-back efforts are competition at its best and inure directly to the benefit of customers.

The Commission has expressly recognized that CMRS is fundamentally different from landline services in applying Section 222(c)(1)(A). Yet the *CPNI Order* fails to recognize the same fundamental differences in applying Section 222(c)(1)(B). AirTouch believes that if the Commission focuses more fully on the unique nature of the CMRS market, it would conclude that the fundamental differences between CMRS and landline require differences in applying Section 222(c)(1)(B) as well; or that forbearance is warranted.

B. Immediate application of the new CPNI rules would be disruptive to CMRS customers. The Commission has recognized that CMRS providers have long used CPNI to

target customers for new features and packages — including packages containing handsets and information services.[15] These practices have been successful, as evidenced by the growth of the CMRS market, the speed in which carriers are converting customers to new digital technologies, and the absence of consumer complaints. The new CPNI rules would disrupt this successful customer/carrier relationship by hampering AirTouch's ability to meet the mobility needs of its customers.

C. There is apparent industry confusion over the scope of the new rules. It is apparent that the CMRS industry itself is not in full agreement over what the Commission has condoned and prohibited in the *Order*. As indicated by the CTIA and GTE filings, there is confusion over the new CPNI requirements and industry is seeking guidance and clarification on a number of issues.

The CMRS industry should not be required to change its marketing approaches if, within the industry, there is not consensus over what the rules permit and what they prohibit; such ambiguities could lead to competitive distortions. A short postponement of the rules' effective date would give the Commission time to provide much needed clarification and to ensure that all competitors are operating under the same set of rules.

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[15] *See, e.g., CPNI Order* at 36 ¶47 and 61 ¶ 77.

D. Reconsideration petitions should be resolved before requiring CMRS providers to dramatically change their long-standing marketing programs. The Commission "previously had allowed CMRS carriers to use CMRS CPNI to market CMRS-related CPE and information services."[16] This long-standing practice must be changed dramatically by May 26, 1998, less than three weeks from now, unless the effective date of the rules is deferred. Even if the Commission decides that reconsideration is inappropriate, the fact remains that the CMRS industry needs additional time to implement the sweeping changes made by new rules 64.2005(b)(1) and (b)(3).[17] Another significant factor affecting compliance activities is the detailed and time consuming efforts and investigations which are now underway to address the Year 2000 computer programming issues.

Conclusion

For the foregoing reasons, AirTouch respectfully requests that the Commission defer, pending a reconsideration and/or forbearance proceeding, the effective date of rules 64.2005(b)(1) and (b)(3) to the extent they apply to CMRS providers. AirTouch further asks that

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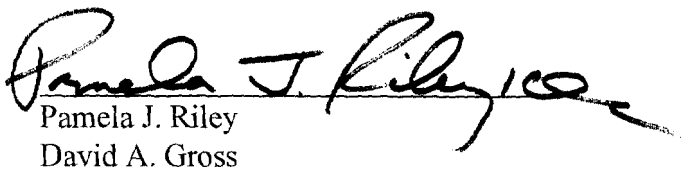
16 *CPNI Order* at 61 ¶ 77.

17 Even if affirmative approval were an effective marketing approach, the fact is the current effective date does not give CMRS providers sufficient time in an attempt to obtain such approval.

the Commission act on this request before May 26, 1998, the date these two rules are currently scheduled to take effect.

Respectfully submitted,

AIRTOUCH COMMUNICATIONS, INC.

By: 
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May 8, 1998

CERTIFICATE OF SERVICE

I, Jo-Ann G. Monroe, hereby certify that I have on this 8th day of May, 1998 caused a copy of the foregoing Comments to be served by first class U.S. mail, postage prepaid, to the following:

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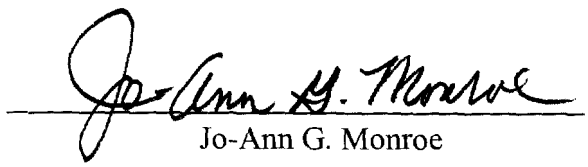

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*By Hand